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9 UNITED STATES DISTRICT COURT
10 FOR THE EASTERN DISTRICT OF WASHINGTON

11 UNITED STATES OF AMERICA,

12 Plaintiff,

13 v.

14 BENJAMIN D. CLIETT,

15 Defendant.

Case No. 1:22-CR-02111-MKD

GOVERNMENT’S OBJECTION TO
PRESENTENCE INVESTIGATION
REPORT

16 Plaintiff, United States of America, by and through Vanessa R. Waldref, United
17 States Attorney for the Eastern District of Washington, and Michael J. Ellis, Assistant
18 United States Attorney, respectfully submits that the Government has reviewed the
19 draft Presentence Investigation Report, ECF No. 174.

20 As forecast in the Plea Agreement, *see* ECF No. 169 at 9, the Government
21 believes that the Defendant’s conduct merits a two (2) level enhancement under
22 U.S.S.G. § 3C1.1. The Government accordingly objects to paragraphs 23 and 31 of
23 the draft Presentence Investigation Report. *See* ECF No. 174 at ¶¶ 23, 31.

24 In the Ninth Circuit, “clear and convincing evidence is not required for factual
25 findings under the Guidelines, even when potentially large enhancements are at stake;
26 fact-finding by a preponderance of the evidence is sufficient to satisfy due process at
27 sentencing.” *See United States v. Lucas*, 101 F.4th 1158, 1163 (9th Cir. 2024); *see*

28 *also United States v. Kilby*, 443 F.3d 1135, 1141 (9th Cir. 2006) (“defining a
GOVERNMENT’S OBJECTION TO PRESENTENCE INVESTIGATION REPORT

preponderance of the evidence as ‘more likely than not’). Further, “courts may consider hearsay at sentencing.” *See United States v. Petty*, 982 F.2d 1365, 1367 (9th Cir. 1993) (citing *Williams v. New York*, 337 U.S. 241 (1949)); Fed. R. Evid. 1101(d)(3). While “[d]ue process requires that hearsay bear some minimal indicia of reliability in order to be considered at sentencing,” “[t]he Confrontation Clause does not apply at sentencing to preclude a court from considering hearsay evidence.” *See Petty*, 982 F.2d at 1370. “The defendant typically has the burden to show that disputed hearsay is false or unreliable.” *See United States v. Franklin*, 18 F.4th 1105, 1114 (9th Cir. 2021) (citing *United States v. Kimball*, 975 F.2d 563, 567 (9th Cir. 1992)).

Under § 3C1.1, a two-level increase in the offense level is appropriate “[i]f (1) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction, and (2) the obstructive conduct related to (A) the defendant’s offense of conviction and any relevant conduct; or (B) a closely related offense.” *See* U.S.S.G. § 3C1.1. Such conduct can include “committing, suborning, or attempting to suborn perjury.” *See* U.S.S.G. § 3C1.1 cmt. n.4(A).

While “inaccurate testimony or statements sometimes may result from confusion, mistake, or faulty memory and, thus, not all inaccurate testimony or statements necessarily reflect a willful attempt to obstruct justice,” *see* U.S.S.G. § 3C1.1 cmt. n.2, the Defendant’s testimony was – at times – so thoroughly fantastical and contrary to other established evidence that an obstruction enhancement is appropriate. The Government highlights the following:

1. The Government presented evidence, *see* Exhibit 73, and the Defendant admitted that he had redeemed one firearm – a PWA Commando rifle – found inside the gun safe from a Yakima pawn shop. *See* Transcript, July 30, 2024, Trial Day 2, at 286–87. The Defendant testified that he had put the gun in a closet, not the safe. *See id.* at 288. Having testified that the written combination

1 for the safe had gone missing, *see id.* at 284, the Defendant testified that (1) he
2 had returned from a family trip to Tacoma to see a concert in 2019; (2) upon his
3 return home the safe was open; (3) his mother-in-law had been left to watch the
4 house; (4) the safe was – at that point – very difficult to access; and (5) the
5 Defendant became “very irate” at finding the safe opened and slammed it shut
6 without looking inside. *See id.* at 289–92; *See* Transcript, July 31, 2024, Trial
7 Day 3, at 43–44, 48–55. The Defendant testified that his mother-in-law must
8 have found the rifle in the closet, found the missing written combination for the
9 safe, opened the safe that was so difficult to operate that the Defendant could
10 not work the mechanism, put the rifle in the safe, and leave the safe open. *See*
11 *id.* The Defendant never confronted his mother-in-law about allegedly opening
12 the safe or bothered to ask her for the combination despite testifying that he
13 wished he had not closed the safe so he could sell the firearms. *See* Transcript,
14 July 30, 2024, Trial Day 2, at 293; Transcript, July 31, 2024, Trial Day 3, at 54–
15 55.

- 16 2. The Defendant testified that, when he went to his house on July 23, 2022, he
17 did not know that A.K. – the Defendant’s intimate partner who the Defendant
18 was prohibited from contacting – was in the house. *See* Transcript, July 30,
19 2024, Trial Day 2, at 300. The Defendant testified that he had parked down the
20 street so the neighbor would not get the wrong idea seeing the Defendant’s
21 truck outside. *See* Transcript, July 31, 2024, Trial Day 3, at 59. The Defendant
22 testified that he “got something to eat, got ready to take a shower, ended up
23 passing out in the bed.” *See* Transcript, July 30, 2024, Trial Day 2, at 301. The
24 Defendant was wearing a pair of basketball shorts without a shirt, shoes, socks,
25 or underwear. *See id.*; Transcript, July 31, 2024, Trial Day 3, at 60. The
26 Defendant only realized that A.K. was present when she woke him up telling
27 him that the police were at the house. *See* Transcript, July 30, 2024, Trial
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1 Day 2, at 302. A.K. was naked. *See* Transcript, July 31, 2024, Trial Day 3, at
2 61.

3 First, the Defendant's tale of how the PWA Commando rifle may have gotten in
4 the safe is simply too far-fetched to be rendered credible by a reasonable person. What
5 happened is obvious: the Defendant redeemed the rifle from the pawn shop, brought it
6 home, and put it in the safe. The Defendant's story – requiring leap after leap
7 concerning how his mother-in-law found the missing combination, found the hidden
8 rifle, unlocked the unlockable safe – is unbelievable. The story was a sham designed
9 to reduce the damage to the Defendant's case from the Government's strongest
10 evidence – the pawn redemption form personally signed by the Defendant. Further,
11 this was no mere mistake or misremembering: the Defendant concocted an alternate
12 explanation to the obvious negative inferences drawn from the Government's
13 evidence. As the Court can find by a preponderance of the evidence that the
14 Defendant's story concerning his mother-in-law was a willful attempt to perpetrate a
15 fraud on the jury, the Defendant's attempt to obstruct his trial justifies a two-level
16 enhancement.

17 Separately, the Defendant's testimony that he only realized A.K. was in the
18 home when she woke him up was not only unbelievable but rebutted by other
19 evidence. The Defendant parked down the street. Why? Groceries had been left to
20 melt and spoil in the Yakima summer heat. *See* Transcript, July 30, 2024, Trial Day 2,
21 at 67. Why? The Defendant and A.K. were either naked or partially clothed. Why?
22 The crying and growling heard by police outside the residence stopped when law
23 enforcement made their presence known. *See id.* at 66, 68. Why?

24 Law enforcement had been summoned to the residence by a neighbor who
25 reported hearing screaming from across the street and over the sound of his TV. *See*
26 Exhibit 118. The neighbor had previously testified during a suppression hearing that
27 he had "heard a woman screaming, my wife and I heard her screaming. We even
28 heard her screaming through our house that we had the door closed, TV on, and we

1 could hear her screaming. Went outside to investigate and still heard her screaming,
2 and it went on for quite some time.” *See* Transcript, August 30, 2023, Suppression
3 Hearing, at 13–14.

4 Again, what is more likely than not? That the Defendant did not hear the
5 screams that drove the neighbor to call 911? That A.K. was making the crying and
6 growling noises entirely separate from anything the Defendant was doing? That A.K.
7 was allowing groceries to spoil outside the residence for some unknown reason
8 unrelated to contact with the Defendant? As with the Defendant’s story concerning the
9 PWA Commando, the Defendant’s testimony that he did not realize A.K. was there
10 until she woke him up is not credible. The Court should – as above – find by a
11 preponderance of the evidence that the Defendant attempted to obstruct justice by
12 minimizing his misconduct and apply a two-level enhancement.

13 The Government accordingly also objects to the sentencing guideline
14 calculations in paragraph 35 and at page 20. With an additional two-levels for
15 attempting to obstruct justice, the Defendant’s total offense level is 18.¹ Coupled with

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23 ¹ Although a defendant typically loses a two-level reduction for acceptance of
24 responsibility if the defendant “puts the government to its burden of proof at trial by
25 denying the essential factual elements of guilt” or is subject to an obstruction
26 enhancement under § 3C1.1, *see* U.S.S.G. § 3E1.1 cmt. n.2, 4, the Government
27 nonetheless moves for a two-level reduction as the Defendant’s plea of guilty has
28 spared the Government and the public the expense of a second trial. The Government
will not, however, move for the additional one-level decrease as the Government was
not able to “avoid preparing for trial and . . . allocate . . . resources efficiently.” *See*
U.S.S.G. § 3E1.1(b).

1 the Defendant's Criminal History Category of II, the Defendant's guideline range is
2 30-37 months.

3 Dated: February 7, 2025.

4 Vanessa R. Waldref
5 United States Attorney

6 s/Michael J. Ellis
7 Michael J. Ellis
8 Assistant United States Attorney
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CERTIFICATE OF SERVICE

I hereby certify that on February 7, 2025, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following: Nick Mirr

s/ Michael J. Ellis
Michael J. Ellis
Assistant United States Attorney